CHIEW SWEE CHAI

v.

BRITISH AMERICAN INSURANCE CO. (M) SDN. BHD.

HIGH COURT MALAYA, MUAR
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 229 OF 1983]
22 DECEMBER 1985

INSURANCE LAW: *Life policy - Interpretation of words in policy - Definition of "loss of one arm" - Principles of construction of such document - Clear and unambiguous words - Presumptions in absence of clear language.*

The plaintiff took out a life policy with the defendants effective from 14 July 1980. The material portion of the policy stated, ... "loss shall mean with regard to hands and feet, dismemberment by severance at or above the wrist or ankle joint, ...".

On 26 September 1980, the plaintiff met with a motor vehicle accident and thereby suffered a complete and permanent loss of function of his left upper limb.

Although the medical opinion was that the arm would have to be amputated, the plaintiff declined to permit the amputation as he did not want to go through life with less than his full physical faculties and he believed that the consequential ungainly and deformed sight at the site of such an operation would be too traumatic an experience for him. Furthermore on any view of medical reports, no benefit would accrue to the plaintiff by insisting on having the arm amputated. Thus Counsel for the plaintiff argued that loss of use of a limb was equivalent to loss by severance because for all practical purposes there had been a total loss of use of the arm.

Held:

[1] The principles to be adopted when construing such documents are clear. The interpretation should be reasonable and any ambiguities should be resolved against the person in whose favour the document was framed.

[2] However, where the words of the policy are clear the sanctity of the contract should be upheld. The language of this policy was clear and unambiguous in stating that loss with regard to hands and feet meant dismemberment by severance. The very purpose of providing for the meaning of the loss of hands and feet was to see that there was no doubt or confusion as to the risk covered. The words have been put there to obviate the necessity for making fine judgments whether a limb has or has not been lost.

[Claim dismissed with costs.]

Case referred to:
Dufty v. City Mutual General Insurance Ltd. [1977] Queensland Report 94

Other sources referred to:
Insurance Law, MacGillivray & Parkington, 9th Edn., para. 1812
Insurance Law in Australia and New Zealand, K.C.T. Sutton, p. 407

For the plaintiff - K.S. Dass; M/s. Wong & Dass
For the defendants - P. Cumaraswamy; M/s. Shook Lin & Bok

JUDGMENT

Mahadev Shankar J:

The plaintiff (hereafter referred to as the 'Insured') took out a life policy with the defendants (hereafter referred to as the 'Insurers') effective from 14 July 1980.

That portion of the policy which is material to the present case reads as follows:

> **Basic Accidental Dismemberment Benefit**
>
> If, while this Policy is in full force and effect ... the Insured, by injuries caused solely by ... accidental means, shall sustain the loss of one hand ..., the Company will pay the Insured one half the amount of insurance payable at the time of such loss, and the Insured may continue the original Policy, without the Basic Accidental Dismemberment Benefit clause, ...
>
> It is understood that loss shall mean with regard to hands and feet, dismemberment by severance at or above the wrist or ankle joint;...

On 26 September 1980 the Insured met with a motor vehicle accident. He was admitted into the Batu Pahat hospital. The x-rays only revealed a fracture of the left femur. The clinical picture however was very much more serious. Although the fracture was well aligned, the Insured was unable to move the left arm and clinically he was diagnosed to be suffering from left brachial palsy involving the 4th, 5th and 6th lumbar segments.

He discharged himself against medical advice on 11 October 1980 from the Muar Hospital and had himself admitted into the Singapore General Hospital on 26 October 1980. Here he received further treatment. An electro myelogram (EMG) was done which revealed that the Insured had a complete brachial plexus with no signs of degeneration. There was complete loss of the function of his left upper limb and on 3 February 1981 a Director of the Ministry of Health Singapore, issued a formal certificate stating it as his opinion that in 6 months' time the Insured would have had to undergo the complete amputation of his left upper limb.

The Insured then presented his claim to the Branch Manager of the Insurers at Batu Pahat.

This man recommended to his Principal at Kuala Lumpur that as the attending doctor in Singapore had certified that the Insured would suffer the loss of his left arm permanently there should be settlement of RM2,375 due to loss of the left arm.

But the Insurers' Claims Committee felt that it would be fair to their Company that such payment should only be made after the amputation was done because it was their view that the wording of the Policy required the severance of the arm at or above the wrist before payment could be made.

On 9 July 1981, the Ministry of Health Singapore issued a 2nd letter to whom it may concern. This repeats that it is anticipated that in 6 months' time the Insured would have a complete amputation of his left upper limb. The words of this certificate are identical to the earlier one and it is not clear to me whether the document is merely a copy of the material words in the previous certificate or whether the medical advisers in Singapore had postponed the necessity for the amputation for a further 6 months.

In September 1981 the Insured put the matter in the hands of his solicitors. The medical opinion was that the arm would have to be amputated in due course, they felt that it would not be unreasonable for the Insurers to pay and requested accordingly.

But the Insures felt otherwise. They pointed out that severance was a condition precedent to payment and that the Medical certificate only made amputation an event which was to take place at some future date.

Subsequently on 20 April 1983 the Insured's solicitors wrote again to the Insurers. They said:

> Our client's hand has not been amputated to date in view of the heavy expenses he may incur. Kindly let us know whether you could treat this matter as dismemberment by severance.

The Insurers responded immediately that without an amputation the request for payment could not be entertained.

On 3 August 1983 the Insured's solicitors informed the Director of the Singapore General Hospital that the Insured had declined to permit the amputation of his left upper limb and asked the doctor certain questions to which he replied that the effect of non-amputation is negligible as the patient has lost the total use of his left upper limb, that the extent of permanent disability he may suffer is the same, that the advantage of an amputation is to remove the useless hand so that he can concentrate and use a prosthesis, and finally that the opinion of amputating the left hand differs in various centres and whether the hand is amputated or not, the disability remains the same.

With this material Insured's solicitors filed an originating summons in this High Court on 12 November 1983.

The Insured affirmed an affidavit in which he states that he had declined to have an amputation because even though the injured limb hangs limp from his shoulder and is physically useless and wasted apart from its mere existence, at least he does not have to go through with less than his full physical faculties and that he believed that consequential ungainly and deformed sight at the site of such an operation would be too traumatic an experience for him.

He contended that the interpretation of the Insurers of the Policy was strict and unreasonable and that the proper interpretation of the words should be directed to impose liability upon the Insurers since the hand was as good as amputated because for all practical purposes there had been a total loss of its use.

Counsel for the Insured has addressed a very lengthy written submission in support of this view. A number of cases have been cited on the principles to be adopted when construing such documents. Of course the interpretation should be reasonable, and of course any ambiguities should be resolved against the person in whose favour the document has been framed. A number of American decisions were also cited where it was held that in the absence of clear language in such policies, the Courts would treat the loss of use of a limb as being equivalent to loss by severance.

But where the words of the policy are crystal clear it is the view of this Court that the sanctity of the contract should be upheld:

MacGillivray & Parkington on *Insurance Law* 9th Edn., at para 1812 states:

> Loss of hands, feet or limbs means loss as a matter of practical utility and is not confined to loss by severance, unless so expressed.

Further in *Insurance Law in Australia and New Zealand* by KCT Sutton at p. 407 it is stated:

> .... a clause providing for compensation in the event of total loss by physical severance of the whole of both hands or the whole of both feet is not applicable to a paraplegic who has suffered total disablement of his limbs, for a disabled limb is not the same thing as a severed limb; ....

Dufty v. City Mutual General Insurance Ltd. [1977] Queensland Rep 94 is the case cited as authority for this proposition. Kneipp J at p. 96 said:

> It is claimed that he should recover under two other clauses, or under one or other of them. First there is a provision for compensation in the sum of $4,000 in the event of total loss by physical severance of the whole of both hands, or the whole of both feet, or of the whole of one hand and the whole of one foot. The plaintiff has not lost any limb or limbs, but his lower limbs are completely disabled. Counsel for the plaintiff relied on decisions of American jurisdiction to the effect that total disablement of a limb should, for the purpose of provisions such as this, be regarded as severance of the limb. With respect, I cannot agree with that. I think that it is a plain misuse of language to say that disablement of a limb is the same thing as severance of a limb.

The chapter and verse which has been directed to this Court to hold for the plaintiff makes it only too obvious that there is a sense of outrage that the Insurers here are insisting upon an amputation when, on any view of the medical reports, no benefit will accrue to the defendants by insisting on having the plaintiff's arm amputated. It has been left to be implied that the cost of the operation may outweigh the amount payable under the policy so as to make it uneconomical for the plaintiff to go through with the exercise even if he were minded to do so. Indeed in his written submission, Counsel for the plaintiff, has sought to draw parallels between the defendant's attitude, and Shylock's insistence upon the performance of his bond in 'The Merchant of Venice'.

But the defendant is an Insurance company with a duty to its shareholders. A company is entitled to expect its officers to carry out their duties in accordance with the tenor of their obligations.

Mr. Param Cumaraswamy Counsel for the defendants has submitted that the language of the Policy, particularly that under the heading 'Basic Accidental Dismemberment Benefit' is clear and unambiguous. Indeed the very purpose of providing for the meaning of loss of hands and feet is to see that there is no doubt or confusion as to the meaning of the risk covered. He says, that it is the failure to provide such definitions which caused controversies in the American cases cited by plaintiff's Counsel.

With these views I entirely agree. The words have been put there, to obviate the necessity for making fine judgments whether a limb has or has not been lost. As Milton says, 'they also serve, who only stand and wait.' Here there was a prognosis for amputation in 1981 but in terms of percentage disability the plaintiff's medical adviser assessed 75% for the left upper limb. Taking the dimmest view of this, even the plaintiff must concede that the limp arm serves a cosmetic purpose. He simply cannot say that he has lost it because it is still there for the whole world to see.

The claim is dismissed with costs.

Also found at [1986] 1 CLJ 408